

▪ Ferriter Scobbo & Rodophele PC ▪

ATTORNEYS AT LAW

125 HIGH STREET, BOSTON, MASSACHUSETTS 02110
TEL: (617) 737-1800 FAX: (617) 737-1803

ROBERT M. GRANGER
EXT. 238
rgranger@ferriterscobbo.com

November 30, 2004

VIA HAND DELIVERY

Mary Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

Re: **Circumstances Under Which an Electric Company Must Seek Department
Approval Pursuant to G. L. c. 164, § 72, D.T.E. 04-92**

Dear Secretary Cottrell:

Enclosed is an original and ten copies of the Comments of the Massachusetts Municipal
Wholesale Electric Company in the above-captioned matter.

Kindly file and docket same.

If you have any questions with respect to the above or the attached, please contact me.

Sincerely,



Robert M. Granger

RMG/km
Enclosures

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COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation By The Department Of)
Telecommunications And Energy On)
Its Own Motion Regarding The)
Circumstances Under Which An Electric) D.T.E. 04-92
Company Must Seek Department Approval)
Pursuant To G.L. c. 164, §72 Prior To)
Transmission Line Construction Or Alteration)

**COMMENTS OF THE MASSACHUSETTS
MUNICIPAL WHOLESALE ELECTRIC COMPANY**

The Massachusetts Municipal Wholesale Electric Company ("MMWEC") submits these comments regarding the preconstruction approval by the Department of Telecommunications and Energy ("Department") under G.L. c. 164, §72 of proposed electric transmission lines and alterations to such lines.

I. MMWEC

MMWEC is a political subdivision and public corporation of the Commonwealth of Massachusetts. *St. 1975, c. 775, §1; G.L., c. 164, App. §1-1 et seq.* The Legislature established MMWEC for purposes of planning, financing and acquiring electric power facilities on behalf of its member Massachusetts municipal light departments and others. See *Massachusetts Municipal Wholesale Electric Company v. Danvers*, 411 Mass. 39, 41 (1991).

Under MMWEC's statute, "electric power facilities" include any system or facility for the generation, transmission, transformation or conservation of electric power and energy. *St. 1975, c. 775, §1.* MMWEC is specifically empowered "jointly or separately to plan, finance, acquire, construct, improve, purchase, operate, maintain, use, share costs of,

own, lease, sell, dispose of, or otherwise participate in” transmission facilities (and other electric power facilities) within or without the Commonwealth. *c. 775, §5(p)* Also, MMWEC is specifically authorized to apply to appropriate agencies of the Commonwealth, including the Department, for such approvals as may be necessary to construct, maintain and operate electric power facilities, including transmission. *c. 775, §5(q)*

Pursuant to its statutory authority, MMWEC constructed the Stony Brook Energy Center in Ludlow, Massachusetts, which consists of a combined cycle generating station and a transmission line which connects the station to the regional power grid.

Chapter 164, §72 is made expressly applicable to MMWEC under its enabling legislation. Chapter 775, §19 provides that c. 164, §72 shall apply to MMWEC “to the extent the provisions of the same are apt and in the same manner and to the same extent as if it were a corporation defined as an electric company in c. 164, §1.”¹

II. COMMENTS

Below are MMWEC’s responses to the specific questions posed by the Department in its Order.

A. Nature of Transmission Lines Subject to §72

1. Question: Does [Section 72] encompass all types of transmission lines that a transmission provider might construct, or are certain types of lines (for example, substation tap lines) excluded from this definition? Please explain.

Answer: Section 72 provides for Department review of “a line for the transmission of electricity [1] for distribution in some definite area, or [2] for supplying

¹ Except as otherwise provided in MMWEC’s enabling legislation, the provisions of c. 164 do not apply to MMWEC. *St. 1975, c. 775, §19(c)*.

electricity to itself or to another electric company or to a municipal lighting plant for distribution and sale or to a railroad, street railway or electric railroad for purposes of operating it.....” Section 72 subjects two types of lines to Department review: (1) lines used to deliver power to distribution centers, and (2) lines used to supply power to the transmission provider, other electric companies, or other wholesale purchasers. This latter group of lines would include lines that tie generation resources together and lines that interconnect the transmission provider with neighboring systems. In addition, Section 72 has been construed to include lines that interconnect different areas of an electric company’s service territory. *Town of Hamilton v. Department of Public Utilities*, 346 Mass. 130, 135-136 (1963).

In *Hamilton*, Massachusetts Electric Company (“MECO”) proposed to construct a 23 kV line to tie together separate segments of the eastern part of its system, specifically, Newburyport, Newbury, West Newbury and Haverhill on the North (“the Haverhill/Newburyport area,”) and Beverly, Wenham, Hamilton, Essex, Rockport and Gloucester on the South (“the Beverly/Gloucester area.”) Each of these areas had different sources of power. An important purpose of the new line was to provide the Haverhill/Newburyport area with an additional source of power when either the generation or a supply line supplying that area was out of service. An additional purpose of the line was to improve the company’s capacity for growth. *Id. at 135*.

The plaintiffs in *Hamilton* argued that the line was outside the scope of Section 72 review because the transmission line was being constructed without an accompanying new source of electric power. The court rejected this argument, holding that “even if it is only a

line 'to shuttle power back and forth between areas,' ...[it] is a line to supply electricity for distribution and to the company." *Id.* at 136.

The purposes of transmission lines identified in Section 72 are consistent with the definition of "transmission" in c. 164, §1. Section 1 defines "transmission" as:

the delivery of power over lines that operate at a voltage level typically equal to or greater than 69,000 volts from generating facilities across integrated high voltage lines to where it enters a distribution system.

Under c. 164, §1, transmission includes (1) the movement of power from generating facilities interconnected across high voltage lines, and (2) the delivery of power to local distribution systems. These functions are essentially the same functions which subject a transmission line to review under c. 164, §72.

Based on the foregoing, lines subject to review under Section 72 would include lines that are used to: (1) integrate generating units; (2) interconnect with other utilities; (3) provide wholesale power to municipal light departments and railway systems, such as the MBTA; (4) deliver power to load centers; and (5) interconnect sources of power to ensure emergency backup.

However, not all high voltage facilities are subject to review under Section 72. For example, circuit breakers, busses, transformers and substation facilities are excluded from Section 72 because they are not "lines". Further, lines that do not perform any of the functions enumerated above should also be excluded from Section 72 review. This would include, for example, short, high voltage lines that interconnect parts of a generating facility, such as 115 kV lines that run between a generating facility's step-up transformer and a switchyard. Such lines are an integral part of the generating facility and do not serve either to deliver power to load centers for distribution or to integrate generation facilities

across a large geographic area. Accordingly, they should be excluded from Section 72 review.

2. Question: Section 72 appears to distinguish between “a line for the transmission of electricity” and other electric lines. Are the Department’s two orders distinguishing transmission and distribution facilities in response to FERC Order 888 (*Classification of Transmission and Distribution Facilities*, DTE 97-93 (1998), and *Western Massachusetts Electric Company*, DTE 03-71 (2004)) relevant to the question of which electric lines are subject to Section 72? Can you propose a clear formula that would distinguish transmission lines subject to Section 72 from distribution lines that would not be subject to Section 72?

Answer: In *Classification of Transmission and Distribution Facilities*, DTE 97-93 (1998), the Department reviewed the transmission and distribution classifications used by Massachusetts electric companies to determine state and federal jurisdiction pursuant to the test established by the Federal Energy Regulatory Commission (“FERC”) in Order 888.² *DTE 97-93 at 1*. FERC’s test is designed to identify local distribution facilities that remain within state jurisdiction when a state unbundles the components of retail service and initiates retail choice. *Id.* “FERC’s test consists of seven indicators, as follows: (1) local distribution facilities are normally in close proximity to retain customers; (2) local distribution facilities are primarily radial in character; (3) power flows into local distribution systems; it rarely, if ever, flows out; (4) when power enters a local distribution system, it is not reconsigned or transported on to some other market; (5) power entering a local distribution system is consumed in a comparatively restricted

² Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, FERC Stats and Regs., para. 31,036 (1996) at 31,770-31,785 (“Order 888”).

geographical area; (6) meters are based at the transmission/local distribution interface to measure flows into the local distribution system; and (7) local distribution systems will be of reduced voltage". *Classification of Transmission and Distribution Facilities at pp 3-4, citing Order 888 at 31,770-31,771.*

The seven electric companies³ required to file analyses of their distribution systems in DTE 97-93 described the major purposes of transmission as: (1) to connect generators to distribution centers; (2) to tie generators together; (3) to transfer power from generation to load centers; (4) to interconnect sources of power to ensure emergency backup; (5) to integrate generation resources over large geographic areas; and (6) to deliver power to local distribution systems. *DTE 97-93 at 5, 8, 14, 19.* Generally, the facilities performing these functions were rated at 69 kV or higher.

In each case, the Department found that the electric company's historical classification method was consistent with FERC's test and that the company's distribution facilities were properly classified as distribution. Also, there was little controversy in the proceeding. A single party raised issues regarding the classification proposals of two electric companies. *DTE 97-93 at 27.*

The Department also found that the historical classification method used by each electric company reflected the major purposes of its transmission and distribution system.⁴ These purposes are essentially the same purposes which subject a transmission line to review under §72. Therefore, the historical classification of transmission lines, consistent

³ Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company, Eastern Edison Company, Massachusetts Electric Company, Fitchburg Gas and Electric Company, and Western Massachusetts Electric Company.

⁴ Some companies stated that their classifications also reflected the guidelines found in the Uniform System of Accounts prescribed for public utilities and licensees subject to the provisions of the Federal Power Act. *See 18 C F R 101, DTE 97-93 at 6.*

with FERC's test in Order 888, provides a basis for determining which lines might be subject to review under §72.

Based on the foregoing, the classification of facilities between the transmission and distribution functions appears relatively straightforward and is always subject to review by the Department. Therefore, applying the classification methods discussed in DTE 97-93 would provide a test for distinguishing between distribution lines not subject to Section 72 and transmission lines that may be subject to Section 72.

3. Question: From a policy perspective, are there voltage, length or other considerations that should dictate when a Section 72 filing is required? If so, please explain.

Answer: Based on the Department's review of Massachusetts electric companies in DTE 97-93, Massachusetts electric companies classify transmission facilities based in large part on voltage level. In that case, Boston Edison, Commonwealth Electric and Eastern Edison classified facilities at 115 kV or higher as transmission facilities while Fitchburg and WMECO classified facilities rated at 69 kV or higher as transmission facilities. MECO generally classified facilities above 69 kV as transmission, but sometimes has included 34.5 kV facilities in transmission when they were used primarily to integrate portions of its system. CELCO has historically classified facilities at 13.8 kV and higher as transmission due in large part to the urban character of its service territory.

Based on the foregoing, the Department could use voltage levels to dictate when a Section 72 filing may be required but the appropriate voltage level may vary from electric company to electric company. NEPOOL's 69 kV voltage threshold is a good bright line test that could be adapted as a minimum threshold for mandatory Section 72 review.

With respect to the length of lines as a criterion of Section 72 review, c. 164, §69G provides for review by the Energy Facilities Siting Board of: (1) new lines 69 kV or higher and one mile or more in length on a new corridor, and (2) new lines 115 kV or higher and ten miles or more in length on an existing corridor, except reconductoring or rebuilding of lines at the same voltage. The Department might consider the same thresholds for mandatory Section 72 review.

Notwithstanding the foregoing, c. 164, §72 subjects to Department review transmission lines which serve the purposes specified in the statute, without regard to the voltage or length of the lines. Therefore, the establishment of voltage and length thresholds for mandatory review does not satisfy, in and of itself, the Department's statutory responsibilities with respect to lines that are below those thresholds but nevertheless serve the purposes specified in Section 72.

The Department has broad authority to establish rules and regulations consistent with c. 164 as may be necessary to administer c. 164. *Massachusetts Electric Company v. Department of Public Utilities*, 419 Mass. 239, 245-246 (1994); *Cambridge Electric Light Company v. Department of Public Utilities*, 363 Mass. 474, 494 (1973). Pursuant to this authority, the Department could establish the voltage level and length thresholds specified in c. 164, §69G as thresholds for mandatory review under Section 72. With respect to lines below those thresholds, but which serve the purposes specified in Section 72, the Department could establish a summary procedure by which an electric company could apply for an exemption from Section 72 review. In this way, the Department could administer Section 72 efficiently, while continuing to satisfy its statutory responsibility to protect the public interest.

4. **Question:** Could the Department exempt certain types or lengths of electric transmission lines from Section 72 review while retaining the ability to authorize the taking of property by eminent domain for a certain line of that type or length, if necessary? If so, please explain.

Answer: Section 72 has been construed to include two separate proceedings, one related to the authority to construct and use the transmission line, and a separate proceeding related to eminent domain authority. *Town of Sudbury v. Department of Public Utilities*, 343 Mass. 428, 431-433 (1962); *Boston Edison Company v. Town of Sudbury*, 356 Mass. 406, 412-418 (1969). It is clear from these cases that Department approval to construct and use transmission lines subject to Section 72 review is required whether or not the company is also seeking to take lands or rights-of-way by eminent domain. However, it is not clear that the converse is true.

Section 72 requires a company seeking eminent domain authority to provide the Department with a plan of “the transmission line” which it proposes. In context, “the transmission line” refers to the transmission line authorized pursuant to the first part of the statute. Therefore, if the Department were to exempt a particular transmission line from Department approval under the first part of Section 72, then arguably at least the Department could not authorize the company to take land for the exempt line by eminent domain under the second part of Section 72.

More importantly the purpose of Section 72 is to protect the public interest. It follows that a determination whether a proposed line “is necessary for the purpose alleged, and will serve the public convenience and is consistent with the public interest.”, c. 164 §72, is a condition precedent to Department authorization to take land by eminent domain.

Accordingly, to the extent the Department exempts a transmission line from Section 72 review, it may not authorize takings with respect to that line. Consequently, Section 72 review would be required in all cases (notwithstanding voltage or length) where eminent domain authority is sought.

B. Transmission Lines With Altered Construction

1. **Question:** Should [Section 72] be read as requiring companies to seek Section 72 approval for alterations to certain transmission lines, where eminent domain is not required for such alterations? If so, what types of alterations might require Section 72 approval, and what types should be considered routine maintenance not requiring such approval?

Answer: As an initial matter, Department approval under Section 72 is a “condition precedent to any new or substantially changed transmission line.” *Boston Edison Company*, 356 Mass. at 416. This is true, whether or not a company seeks eminent domain authority. *Id.* at 418. Reading Section 72 to require Department approval for alterations only where eminent domain is required would deny to the Department in some circumstances control over transmission lines “which strongly tends to ensure protection of the public interest.” *Id.* at 417-418.

The *Boston Edison* case is useful with respect to the types of alterations which might require Section 72 approval. In that case, Boston Edison proposed to construct a 230 kV transmission line using portions of a right-of-way already used for 13.8 kV and 115 kV transmission lines. The existing transmission lines were supported on wood poles from 65 to 80 feet in height. The proposed construction was to use lattice type steel towers varying

in height from 110 to 125 feet. *Id.* at 410. The court held that locations granted by the selectmen, although indefinitely phrased, referred substantially to the “particular type and magnitude of transmission line and of construction discussed when the application is made to the selectmen.” *Id.* at 423. A location not expressed with precision, “may be interpreted as permitting reasonable variations from, and replacements of, the particular structures proposed or in contemplation at the time.” *Id.* The court concluded that the changes that Edison proposed were substantial, increasing not only the voltage, but also increasing the height and modifying the type of construction of the towers. *Id.*

A similar approach triggers Siting Board review of transmission lines. Under c. 164, §69G, “reconductoring or rebuilding of transmission lines at the same voltage” does not require Siting Board approval.

The same type of analysis should apply to Section 72. Thus, Section 72 approval should not be required to repair transmission lines or to reconductor or rebuild them at the same voltage level. However, if the alterations involve higher voltage facilities or substantially different construction, Section 72 approval may be required.

C. Scope of Section 72 Proceedings

1. Question: Attached to this Request for Comments is a draft checklist, similar to the checklist used for zoning exemptions, which outlines the information that should be submitted as part of a Section 72 filing. Does the checklist accurately convey the scope of current Department proceedings with respect to Section 72 reviews? If not, what should be changed to accurately convey that scope? Would you recommend any changes to the current scope of Section 72 review?

Answer: MMWEC has not been involved in any current Department proceedings with respect to Section 72 review.

2. Question: As discussed above, there have been differences of opinion in the past as to whether G L. c. 164, §72 requires that a company seek Department approval to construct any new transmission line, or whether the Department's approval is necessary only when an eminent domain taking is necessary for such construction. Given the court's holdings in Sudbury and BECO and the amendments to G.L. c. 164, §72 adopted as part of Chapter 249 of the Acts of 2004, is it still possible to argue that the Department approval should be required only when eminent domain taking is necessary for the construction of a transmission line? If so, please explain.

Answer: As discussed above, at the time of the *Sudbury* and *Boston Edison* decisions, it was clear that Section 72 approval was required to construct a new transmission line subject to review under Section 72, regardless of whether eminent domain authority was sought. The amendment of c. 164, §72 adopted as part of Chapter 249 of the Acts of 2004 does not require a different result. For the most part, the 2004 amendment to Section 72 replaced "electric company" with "electric company, distribution company, generation company or transmission company, or any other entity." It did not change the pre-construction review process or the process for authorizing eminent domain.

The Amendment also added a sentence to the end of c. 164 §72 which provides "No entity shall be authorized under this section or Section 69R or Section 24 of c. 164A to take by eminent domain any lands or rights-of-way or other easements therein held by an electric company or transmission company to support an existing or proposed transmission line without the consent of the electric company or transmission company." This sentence

adds only an additional requirement for eminent domain takings when the taking involves land owned by an electric company or transmission company. It does not relate, in any way, to approvals under Section 72. Therefore, Section 72 approval of new transmission lines subject to Section 72 review continues to be required regardless of whether eminent domain proceedings are involved.

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC COMPANY,

By its attorneys,



Nicholas J. Scobbo, Jr.
Robert M. Granger
Ferriter Scobbo & Rodophele, PC
125 High Street, 26th Floor
Boston, Massachusetts 02110
(617) 737-1800

Dated: November 30, 2004

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